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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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# No. 344

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AVERY DEXTER, *Appellant,*

*vs.*

THE STATE OF WASHINGTON, *Appellee*

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## STATEMENT AS TO JURISDICTION

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Pursuant to Rule 12, paragraph 1, of the rules of the United States Supreme Court, Avery Dexter, the above named appellant files this his statement, particularly disclosing the basis upon which it is contended that said court has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Washington appealed from herein, as follows:

(a) The statutory provision believed to sustain the jurisdiction is Title 28, United States Code, Section 1257 (2), which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court, by appeal, where is drawn in question the validity of a statute of

any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(b) The statute of the State of Washington, the validity of which is involved, is Chapter 193 of the Laws of Washington, 1945, found also in Remington's Revised Statutes of Washington Annotated, 1945 Supp., Sections 5823-10, *et seq.*, as amended by Chapter 218 of the Laws of Washington, 1947, found in the 1947 Supp., Sections 5823-11 *et seq.*

The title of the original act is as follows:

> "An Act relating to forestry; prescribing practices to be observed in the harvesting of forest products which will tend to insure future growth; providing for the enforcement thereof; and imposing penalties."

The material portion of the title of the amending act is "An act relating to forestry (and) prescribing practices to be observed in the harvesting of forest products. . . . "

The amended statute as it existed at the time of the institution of the action, and as it now exists is, verbatim, as follows:

> "Section 1. Keeping the forest land of this state continuously and fully productive is one of the most important steps toward perpetuation and conservation of its forest resources. One of the most important means of effectuating such public policy is to keep timber lands productive by seeking to maintain continuous growth of timber on all lands suitable for such purposes, and in order to accomplish this end it is necessary, and in the public interest to prescribe certain rules of forest practices to be observed in the harvesting of timber.
>
> "Section 2. When used in this act:
>
> 1. The term "Forester" shall mean the State Supervisor of Forestry.

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2. The term "owner" shall mean the owner of any forest land.

3. The term "adequate restocking" shall mean a stand of not less than three hundred (300) established live seedlings per acre of which at least one hundred (100) shall be well distributed, or not less than three hundred (300) surviving trees per acre which were established by artificial means.

4. The term "merchantable stand of timber" shall mean any stand of timber consisting of not less than three thousand (3,000) board feet per acre of currently merchantable live timber as measured by the Scribner Decimal C log rule or three hundred (300) cubic feet as measured by the Sorensen log rule.

5. The term "operator" shall mean any person, firm or corporation which engaged in logging of timber for commercial purposes from any land within the State of Washington.

"Section 3. Any bona fide owner or operator of land in the State of Washington, supporting a merchantable stand of timber, to be cut during the current calendar year must first obtain a written permit from the Forester.

To obtain such a permit, the owner or operator must make written application to the Forester submitting a map showing the area to be logged, legal description, and acreage. If the application is made by the operator, the Forester may require as a condition precedent to the issuance of a permit either that the operator secure from the owner and file with the Forester an agreement that the owner will be jointly responsible with the operator for carrying out the requirements of this act, or that the operator furnish a bond or other security satisfactory to the Forester to insure satisfactory compliance with this act.

Each application shall be signed by the owner or operator, and shall set forth the provisions of this act as to the responsibility of the owner or operator, and shall

further state that the owner or operator is familiar with its provisions and agrees to abide thereby. All permits shall expire at the end of each calendar year but shall be renewable for another year upon written application of the owner: Provided, That there has been no violation of this act.

"Section 4. It shall be the duty of every permittee to provide that during the process of logging adequate precautions shall be taken to leave reserve trees of commercial species deemed adequate under normal conditions to maintain continuous forest growth, or provide adequate restocking to insure future forest production. In the conduct of logging operations and prior to and during slash disposal as required by chapter 58, Laws of 1939, proper precautions shall be taken and every reasonable effort made by the operator to protect residual stands and trees left uncut as a source of seed supply, from destruction by fire or unnecessary damage resulting from logging operations.

"Section 5. The provisions of this act shall be deemed to have been complied with in the area east of the summit of the Cascade Mountains within the State of Washington if at time of issuance of a certificate of clearance by the Forester in accordance with Chapter 140, Laws of 1941, there shall have been reserved and left uncut all immature Ponderosa pine trees sixteen (16) inches or less in diameter breast high outside the bark. Where compliance with the above provisions of this section would not leave at least four (4) Ponderosa pine seed trees per acre at least twelve (12) inches in diameter breast high outside the bark and well distributed over the area cut, there shall be left additional seed trees of commercial species predominant in the stand, including but not limited to Ponderosa pine, sixteen (16) inches in diameter or larger breast high outside the bark in a quantity sufficient to aggregate four (4) thrifty seed trees per acre well distributed over the area cut.

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On areas of second growth and prior cut timber, where poles, piling, mine timbers or other special products are being harvested or where stand improvement cutting is practiced, not over one-half (½) the trees between twelve (12) inches and eighteen (18) inches diameter breast high outside the bark shall be cut in any ten-year period beginning on the date of initial cutting, and the remaining trees shall be evenly distributed over the area. In stands which are predominantly lodgepole pine, there shall be reserved and left uncut five per cent (5%) of each forty-acre subdivision well stocked with trees of seed bearing size.

"Section 6. The provisions of this act shall be deemed to have been complied with in the area west of the summit of the Cascade Mountains, if at time of issuance of a certificate of clearance by the Forester in accordance with chapter 140, Laws of 1941, there shall have been reserved and left uncut not less than five per cent (5%) of each quarter section (160 acres) or lesser subdivision well stocked with commercial coniferous trees not less than sixteen (16) inches in diameter breast high outside the bark until such time as the area is adequately stocked by natural means. The foregoing may be accomplished by leaving marginal long corners of timber between logged areas, or strips of timber across valleys, or along ridges and natural fire breaks, or leaving staggered settings and uncut settings.

"Section 7. In the event that any owner or operator shall desire to adopt other practical methods than those contained in sections 5 and 6 hereof for providing for future forest growth within the meaning of section 4 hereof, including but not limited to artificial restocking or partial or selective cutting of the entire stand, said methods may be substituted in lieu of the provisions of sections 5 and 6 hereof, if approved by the Forester. Said plans shall be filed with the Forester previous to application for permit.

"Section 8. The Forester shall have the power to employ a sufficient number of technically trained for-

esters as inspectors to enable him to maintain an inspection service deemed adequate to secure compliance with the provisions of this act. In the event that an owner or operator shall fail, refuse or neglect to comply with the provisions of this act, the Forester shall be empowered to order the particular operation in which the violation occurs discontinued until the owner or operator has given satisfactory assurance that he will resume operations in compliance with the provisions of this act and furnish cash deposit or bond in lieu thereof as set by the Forester but not to exceed eight dollars ($8) per acre for that portion of the area which through his failure to carry out the provisions of this act does not have sufficient source of seed to adequately restock the area. Such order may be enforced by injunction proceedings. Such cash deposit or bond shall be furnished to insure that the owner or operator will artificially restock the area for which the money was collected within five (5) years. In the event that at the end of said five (5) years the owner or operator has not artificially restocked the area, or this area has not become adequately restocked, the cash deposit shall be forfeited, or if the owner or operator has posted bond in lieu of making cash deposit he shall within thirty (30) days after notification in writing by the Forester furnish the amount of money for which he has posted bond. The Forester shall place this money in a special deposit fund of the State Treasury for artificially restocking the land on which the deposit was withheld. The Forester shall artificially restock the area within two (2) years after said deposit has been forfeited, using the money in the special deposit fund collected from the owner for that purpose. In the event that the full amount of money forfeited for any specified area is not required by the Forester to restock the area, the unexpended balance shall be returned to the depositor. Until compliance is so assured, the Forester shall also have power to prevent any new operation or operations in this state by the delinquent operator. Any person violating the pro-

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visions of this act by operating without a permit shall be guilty of a misdemeanor, and each day of operation shall constitute a separate offense."

(Chapter 140, Laws of 1941, relates to slash disposal.)

(c) The date of the judgment sought to be reviewed is the 15th day of June, 1949. The date upon which the application for appeal is presented is the 15th day of August, 1949.

Appellant and his wife owned 320 acres of land in Pend Oreille County, containing merchantable timber. Before the enactment of the statute, appellant had been cutting timber on the land, and he continued to do so after enactment of the statute without applying to the state forester for a permit. Thereupon, the state instituted this action for an injunction. The lower court denied the application, holding the statute invalid as impairing the obligation of contract, namely, the patents of the predecessors in interest of appellant and his wife. On appeal, the Supreme Court of the State of Washington reversed, holding that the statute did not impair the obligation of contracts, nor, as also urged by appellant, provide for the taking of appellant's property without due process of law in contravention of the 14th Amendment of the Constitution of the United States, and remanding the cause with instructions to enter an order enjoining appellant from further timber-cutting operations until he should have obtained a permit and given satisfactory assurances that he would comply with the statute. Thus is drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

In the following cases involving the use of land the court has entertained a writ of error or appeal from a judgment of the highest court of a state where the validity of a state

law has been drawn in question by the landowner on the ground of repugnancy to the due process clause of the Fourteenth Amendment.

*State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge* (1928) 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50. (Municipal zoning ordinance making right to maintain home for aged dependent upon consent of neighboring owners.)

*Thomas Cusack Co.* v. *Chicago* (1916) 242 U. S. 526, 61 L. Ed. 472, 37 S. Ct. 190. (Municipal ordinance regulating erection and maintenance of billboards in residential districts.)

*Ohio Oil Co.* v. *Indiana* (1900) 177 U. S. 190, 44 L. Ed. 729, 20 S. Ct. 576 (Statute prohibiting waste of natural gas and oil.)

*Bandini Petroleum Co.* v. *Superior Court of State of California* (1931) 284 U. S. 8, 76 L. Ed. 136, 52 S. Ct. 103 (Statute adjusting co-existing rights of surface owners in underlying oil and gas.)

The ground upon which it is contended that the question involved is substantial is that the statute unreasonably diminishes the owner's dominion over, and enjoyment of, his property, without compensation, coupled with the circumstance, as we submit, that the prior decisions of the court have not considered the question of reasonableness in any similar or analogous situation. Zoning ordinances and the like are justified as involving the public health, safety, morals or general welfare. *Village of Euclid, Ohio* v. *Ambler Realty Co.* (1926) 47 S. Ct. 114, 272 U. S. 365, 71 L. Ed. 303. Laws regulating the taking of oil and gas are based upon the necessity of adjusting the co-existing rights of surface owners in the common pool. *Bandini Petroleum Co.* v. *Superior Court of the State of California,* (1931) 284 U. S. 8, 76 L. Ed. 136, 52 S. Ct. 103. A closer analogy

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would be found in an effort of the state to limit the use of agricultural land in order to conserve the soil. Such a statute has been held invalid. *State* v. *Smith* (Tex. 1932) 47 S. W. (2d) 642. The federal soil conservation program is upon a voluntary basis, with compensation.

In the court of the first instance, the federal question sought to be reviewed was raised by appellant in argument upon the stipulated facts, as appears from the memorandum opinion of the trial court, though the court placed its emphasis upon the obligation of contracts, rather than the due process requirement, which latter we conceive to be the actual ground involved.

In the appellate court the question was raised in the briefs and on the argument, as appears in the opinion. The court said, 132 Washington Decisions, 550-551:

> "Respondent develops four arguments in support of the judgment, two of which may be considered together, i.e.:
>
> (1) The act authorizes what amounts to the taking of private property without compensation and establishes an unreasonable exercise of the police power; and (2) it destroys private property rights and impairs the obligation of contracts as guaranteed by the constitution of the United States.
>
> Respondent urges, and the trial court principally relied upon, the proposition that the act in question impairs the obligation of contracts, in contravention of Art. I, Sec. 10, of the constitution of the United States. It is also strenuously urged that it provides for the taking of property without due process of law, in contravention of amendment 14 of the constitution of the United States, and Art. I, Sec. 3, of the constitution of the State of Washington. These arguments are bottomed upon the proposition that there are no restrictive reservations in the patent from the United States preventing the cutting of timber on respondent's property or requiring reforestation, and that,

having a fee-simple title, respondent is entitled to do as he pleases with his own property."

The court held that the statute was justifiable under the police power, as against the due process claim.

Questions discussed in the opinion of the highest court of the state may be reviewed. *Nickey* v. *State of Mississippi* (1934), 292 U. S. 393, 78 L. Ed. 1323, 54 S. Ct. 743.

Appended are copies of the memorandum opinion of the Superior Court, the opinion of the Supreme Court, including the dissenting opinion of Simpson, J., the Supreme Court's Order Changing Opinion and Recalling and Changing Remittitur, and the Judgment of the Supreme Court.

It is therefore respectfully submitted that the court has jurisdiction of this appeal under Title 28, United States Code Section 1257 (2).

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*Spokane, Washington,*
*Counsel for Appellant.*

JOHN T. RAFTIS,
*Colville, Washington,*
*Of Counsel for Appellant.*

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## APPENDIX

### IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PEND OREILLE

No. 3743

STATE OF WASHINGTON, *Plaintiff*,

*vs.*

AVERY DEXTER, *Defendant*

MEMORANDUM OPINION

This action was instituted by the plaintiff on or about the 6th day of October, 1947, whereby an order to show cause was granted requiring the defendant to appear on the 14th day of October, 1947, at 10:00 o'clock, to show cause, if any, why a temporary injunction should not be issued in accordance with the prayer of the complaint. Thereafter a demurrer was filed and served by counsel for the defendant. All material facts were stipulated by the Attorney General, representing the plaintiff, and Mr. John T. Raftis of Colville, Washington, representing the defendant.

The cause came on for hearing on the demurrer on the 9th day of December, 1947, and it appearing to the Court that in any event the result would be appealed to the Supreme Court, I requested that the facts be stipulated and all questions be determined at that hearing. This was done, and by stipulation defendant was permitted to file an answer in January, 1948, and plaintiff, under stipulation, filed an amended complaint in February of 1948, as shown by the records and files herein.

Plaintiff prays that defendant and any persons on his behalf be permanently restrained and enjoined from further timber-cutting operations in the State of Washington until he shall have obtained a permit from the State Forester giving satisfactory assurances that he will in his timber operations comply with Chapter 193, Laws of 1945 as amended. The answer of defendant denies the allegations of

the complaint. The constitutionality of the Act and the amendments thereto as alleged in the complaint was raised by the defendant on demurrer. All pertinent facts are before the court in this case and the questions of law involved will be decided.

This action is brought under the provisions of Chapter 193, Laws of 1945, as amended by Chapter 218, Laws of 1947, generally referred to as the Forest Practices Act. The purpose of the Act as stated in Section 1 of the Laws of 1945, is as follows:

> "Keeping the forest land of this state continuously and fully productive is one of the most important steps toward perpetuation and conservation of its forest resources. One of the most important means of effectuating such public policy is to keep timber lands productive by seeking to maintain continuous growth of timber on all lands suitable for such purposes, and in order to accomplish this end it is necessary, and in the public interest, to prescribe certain rules of forest practices to be observed in the harvesting of timber."

The statute and the amendment prescribes briefly that no person shall cut timber for commercial purposes on any forest lands in the State of Washington until either the owner or the operator has applied for and obtained from the State Forester a permit for the cutting thereof. Where the land is forest land as defined in the Forest Practices Act, it is necessary for the permittee to agree to follow certain rules and regulations as prescribed to insure the restocking of the area after the logging operations have been completed. Section 9 provides that where cutting of timber is for the bona fide purpose of clearing land for agricultural, residential, business, or other purposes, the Forestor *may* issue a permit without requiring the observance of the practices designed to insure restocking of the area.

Section 8 as amended by the law of 1947 reads as follows:

> "The Forester shall have the power to employ a sufficient number of technically trained foresters as inspectors to enable him to maintain an inspection

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service deemed adequate to secure compliance with the provisions of this act. In the event that an owner or operator shall fail, refuse or neglect to comply with the provisions of this act, the Forester shall be empowered to order the particular operation in which the violation occurs discontinued until the owner or operator has given satisfactory assurance that he will resume operations in compliance with the provisions of this act and furnish cash deposit or bond in lieu thereof as set by the Forester but not to exceed eight dollars ($8) per acre for that portion of the area which through his failure to carry out the provisions of this act does not have sufficient source of seed to adequately restock the area. Such order may be enforced by injunction proceedings. Such cash deposit or bond shall be furnished to insure that the owner or operator will artificially restock the area for which the money was collected, within five years. In the event that at the end of said five years the owner or operator has not artificially restocked the area, or this area has not become adequately restocked, the cash deposit shall be forfeited, or if the owner or operator has posted bond in lieu of making cash deposit he shall within thirty (30) days after notification in writing by the Forester furnish the amount of money for which he has posted bond. The Forester shall place this money in a special deposit fund of the State Treasury for artificially restocking the land on which the deposit was withheld. The Forester shall artificially restock the area within two years after said deposit has been forfeited, using the money in the special deposit fund collected from the owner for that purpose. In the event that the full amount of money forfeited for any specified area is not required by the Forester to restock the area, the unexpended balance shall be returned to the depositor. Until compliance is so assured, the Forester shall also have power to prevent any new operation or operations in this state by the delinquent operator. Any person violating the provisions of this act by operating without a permit shall be guilty of a misdemeanor, and each day of operation shall constitute a separate offense."

The allegations of the complaint state, in substance, that the defendant has neither secured nor applied for a permit in compliance with the law but has actively engaged in the cutting of timber for commercial purposes in this state; that he has been served with a notice to cease operations but ignored such notice; that the action was brought for the purpose of restraining further operations by defendant until there was compliance with the statute, a permit obtained, and satisfactory assurance given to the Forester that he would in the future comply with all the provisions of the law.

The facts in this case were stipulated and are as follows:

*Stipulation of Facts*

It is hereby stipulated in open court between Lyle L. Iverson, Assistant Attorney General, as attorney for the plaintiff, and John T. Raftis as attorney for defendant, that the following are the material facts involved in this action:

1. It is hereby stipulated that the defendant, Avery Dexter, at all times since the year 1938 has been and now is the lawful husband of Hazel Dexter; and that at all times since the year 1938 the said Avery Dexter and Hazel Dexter, his wife, have been and now are residents of Pend Oreille County, Washington.

2. That on or about the month of September, 1945, Avery Dexter and Hazel Dexter, his wife, acquired fee simple title as a community, and at all times since have been and now are the owners in fee simple of the following described property situated in Pend Oreille County, Washington:

> The Northwest Quarter; and north half of the Southwest Quarter; and the Southeast of the Southwest Quarter; and the Southwest of the Southeast Quarter of Section 24, Township 36 North, Range 44, consisting of 320 acres.

3. That the defendant Avery Dexter at all times since the year 1936 has been principally engaged in work in timber and logging operations, and that during the year 1947

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was engaged in the business of logging timber as an individual on behalf of himself and the community composed of Avery Dexter and Hazel Dexter, his wife.

4. That prior to the time that the said Avery Dexter and Hazel Dexter, his wife, acquired title to the real estate above described, the merchantable timber had been cut, logged and removed by parties other than the said Avery Dexter and Hazel Dexter, his wife, or either of them.

5. That in purchasing said property it was the purpose and intention of the said Avery Dexter and Hazel Dexter, his wife, to use said timber as fuel for their own personal use, which they have done at all times since acquiring such title; that it was further their purpose and intention to retain said premises and timber thereon for future growth, use and marketing; that it was also the purpose and intention of said Avery Dexter and Hazel Dexter, his wife, to use said premises for purposes of future grazing of livestock and for use as a temporary home for recreational purposes; that situated on said premises is also a quantity of growing white pine, fir and larch, or tamarack, which has present and future value for the personal use and for commercial purposes by the said Avery Dexter and Hazel Dexter, his wife.

6. That about the month of November, 1945, and continuing into the year 1946 the said defendant, Avery Dexter, cut approximately 150,000 feet log measure of fir, larch and white pine on the said premises for the purpose of selling the same on the market; that from and after the month of November, 1945, and until the commencement of this action, said defendant, Avery Dexter, cut from said premises a quantity of hemlock timber suitable for the purposes of pulp wood for the manufacture of paper and paper products.

7. That in the cutting and logging of the said timber owned by said Avery Dexter and Hazel Dexter, his wife, it is the statement and claim of the defendant, Avery Dexter, and Hazel Dexter, his wife, that there was no waste or wanton or unnecessary destruction of the remaining timber, and that said cutting and logging operations were con-

ducted in a careful, normal, and prudent manner, and that the plaintiff herein makes no contention or assertion that there was or was not any such waste or unnecessary destruction of timber.

8. That at the time the timber cutting and operations commenced herein, Chapter 193, Laws of 1945, had not become effective as the law of the State of Washington.

9. That after Chapter 193, Laws of 1945, became effective as the law of the State of Washington, the said Avery Dexter, defendant, and Hazel Dexter, his wife, or either of them, did not apply for or obtain any permit from the State Forester of the State of Washington either to cut or log timber on the above described premises, nor did anyone on their or either of their behalf, or on any other premises in the State of Washington. Nor did the responsible officers of the State of Washington at any time reject any application nor indicate to the defendant that a suitable application would not be approved.

10. That on or about August 20, 1947, the State Forester of the State of Washington prepared and directed to Avery Dexter, defendant herein, at Usk, Washington, a written order requiring that said Avery Dexter should make application for a permit to cut timber; that a full, true and correct copy of same is as follows:

"August 19, 1947.

MR. AVERY DEXTER,
Usk, Washington.

DEAR SIR:

We have been advised that you are cutting timber and logging without a timber cutting permit. Chapter 193 of the Laws of Washington, 1945, required that "Any bona fide owner or operator of land in the State of Washington supporting a merchantable stand of timber to be cut during the current calender year must first obtain a written permit from the Forester.

Because of the fact that you have been given ample opportunity to make application for timber cutting per-

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mit and have refused to do so, we have no alternative than to order your operation shut down immediately, until such time as timber cutting permit is secured from this office. Forms for your convenience in making application are enclosed. The original law with amendments is printed in full on the reverse of the application.

Your attention is called to the last sentence in Section 8, which reads as follows: 'Any person violating this act by operating without a permit shall be guilty of misdemeanor, and each day of operation shall constitute a separate offense.' In order that no further action need be taken, we trust that you will make application for timber cutting permit without delay.

Very truly yours,

T. S. GOODYEAR,
*Supervisor of Forestry,*
By: L. T. WEBSTER, Acting."

LTW:ed
Enc.
CC: J. Link.

that said letter was received by the defendant on or about August 20, 1947; that logging operations were continued by defendant until the issuance of the temporary injunction in this case.

11. That prior to August 20, 1947, and about the month of July, 1947, it was stated and contended by the defendant that the principal purpose and reason for the removal of the said timber by Avery Dexter was and is that the major portion of said timber was ripe, or overripe, and much of it had rotted or deteriorated and was affecting the health, growth and increase of the residual stands of timber, and that such statement or claim was verbally communicated to one Robert McCauley, an official of the State Forester of the State of Washington, about July, 1947, and that thereupon said Avery Dexter was informed by said Robert McCauley that he would nevertheless have to obtain a permit from the State Forester to remove such trees; that the defendant

at all times refused to apply for a permit, and the contention as set out herein was never embodied in a formal application for permit submitted to the State Forester.

12. That the defendant did not communicate to the representatives of the State his desire to clear the land for grazing purposes, although it is stated that such was his intention and purpose in acquiring and holding said premises; and the defendant states and contends that he acquired and held said premises for the purpose of future use in earning his livelihood for himself and family.

Chapter 193, Laws of 1945, as amended by Chapter 218, Laws of 1947, is plain relative to conditions that must be complied with by owners of forest lands within the state. It provides that the State Forester shall administer the act and may either grant or refuse permits on each application. The constitutionality of the law has been raised in this case. The declared purpose of the law in its declaration of policy has been heretofore quoted.

It is common knowledge that many of the natural resources not only of the State of Washington but of the United States are being very rapidly depleted. Not only is that true of the forests but it is also true of metallic ores, particularly iron, lead, and zinc, and also oil and gas.

The title to all lands in this state was first vested in the United States Government, and title was conveyed to the state and to individuals in compliance with law. In many instances, particularly where conveyances were made to individuals, there were mineral and water reservations expressly stated in the patents or deeds conveying such lands. Under the provisions of the enabling act wherein this State was admitted to the Union, 500,000 acres were set aside for the benefit and use of the higher institutions of learning. In addition thereto, Sections 16 and 36 in each township and range within the confines of the state were set aside for the support of the common school system, and additional lands were set aside for designated purposes.

It was not the policy of the United States Government in deeding and conveying land in this state to make any

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timber reservations whatsoever, and that is precisely the fact in respect to sales of land owned by the State of Washington for many years after admission. The biennial report of the Commissioner of Public Lands for the two-year period ending September 30, 1946, on page 28 thereof, gives a summary of the disposition of all lands, including school lands, as well as other granted lands, showing the acreage that has been sold and transferred by the state up to that time. This report discloses that there have been 488,168.79 acres of common school lands deeded, and other lands that were state owned sold or a total acreage conveyed of 648,245.21. In the various grants at the time this state was admitted to the Union there were a total of 2,832,043.28 acres set aside largely for educational purposes, leaving in state ownership approximately two and one quarter million acres on Sept. 30, 1946.

Under the provisions of Chapter 256 of the Session Laws of 1907, a law was enacted as follows:

> "Provided further. That each and every contract for the sale of any State lands, or deeds or patents to such State lands except deeds or patents issued pursuant to contracts heretofore made shall contain the following saving clause: "The party of the first part hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its successors, and assigns forever, all oils, gases, coal, ores, minerals and fossils of every name, kind or description, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oil, gases, coal, ores, minerals, and fossils; and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right to enter by itself, its agents, attorneys and servants upon said lands or any part or parts thereof, at any and all times, for the purpose of opening, developing and working mines thereon, and taking out and removing therefrom all such oils, gases, coal, ores, minerals and fossils, and to that end it further expressly reserves out of the grant hereby made, unto

itself, its successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain and use all such buildings, machinery, roads and railroads, sink such shafts, remove such soil, and to remain on such lands or any part thereof for the business of mining and to occupy as much of said land as may be necessary or convenient for the successful prosecution of such mining business hereby expressly reserving to itself, its successors and assigns, as aforesaid, generally, all rights and powers in, to, and over said lands, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved:"

Provided further, That no rights shall be exercised under this reservation by the States, its successors or assigns, until provision has been made by the State, its successors or assigns to pay to the owner of the land upon which the rights herein reserved to the State, its successors or assigns or sought to be exercised, full payment for all damages sustained by said owner, by reason of entering upon said land."

It will be noticed that in the enactment of the statute quoted, it was recognized by the sovereign state that "every contract for the sale of any state lands or deeds or patents to such state lands, except deeds or patents issued pursuant to contracts heretofore made, shall contain the following saving clause * * *." The only purpose of the saving clause was in recognition of the clear and unmistakable mandate pertaining to contracts of the Constitution of the United States and of the State of Washington. The Constitution of the United States, Article 1, Sec. 10, Subdivision 1, provides:

"No state shall pass any law impairing the obligation of contracts." The Constitution of the State of Washington provides, Article 1, Section 23:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."

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The paramount question in this case is, Does the law in respect to the control of logging in this state impair the obligation of contracts? The Attorney General, representing plaintiff, vigorously contends that the Forestry Practices Act is constitutional and within the police power, and defendant by his counsel maintains and contends with equal vigor that it is unconstitutional and without the police power of the sovereign state. There can be no doubt that it is a question for the courts to determine.

It must be admitted that our forests and reforestation and the continued production of forest areas have been mismanaged and that there has been a great wastage over a period of many years of timbered areas and of the forests growing thereon. It is also common knowledge that the perpetuation and conservation of the forest resources of this state is very important in our economy. Practically the only remaining large stands of timber in the United States are found in the western states, and particularly in Washington and Oregon.

It appears that under the provision of the law in question the state under its police power would exercise almost *complete dominion* over the forested areas of this state. The pertinent question is, Can the police power be stretched to this extent? It is human nature that when the dike is once breached, under the guise of the police power it goes to very great extremes without either legal right or justification. In *Pa. Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322, Justice Holmes said:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment."

In 208 U. S. 598, 52 L. Ed. 637, the Court said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. As stated by the Supreme Court of the United States in 195 U. S. 223, 49 L. Ed. 169 * * * it is now thoroughly well settled by the decisions of this court that municipal bylaws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determine whether the law or ordinance is a lawful exercise of the police power or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In the case of *Dobbins* v. *Los Angeles*, 195 U. S. pp. 175-176, 49 L. Ed. 235, the Supreme Court of the United States said:

> "To justify the state in thus interposing this authority in behalf of the public, it must first appear that the interests of the public generally as distinguished from those of a private owner require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts."

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And further in the same case, quoting Justice Harlan, the Court continued:

> "* * * But as the Constitution of the United States is the Supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state even when avowedly enacted in the exercise of its police powers must yield to that law. No right granted or granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. * * *"
>
> "* * * The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if by their necessary operation its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

The Attorney General in his memorandum brief cites the case of *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 52 L. Ed. 828. It is evident from a careful reading of the opinion by Justice Harlan that the facts in that case are entirely different from the facts in the instant case. It appears that plaintiff sought to divert water from the State of New Jersey to Staten Island, New York. The State of New Jersey contended that the need of preserving the fresh water of the state for the health and prosperity of the citizens was imperative and enacted a law that "it shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches, or canals the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state for use therein." "By a second section a proceeding like the present was authorized in order to enforce the act. * * * After the passage of this statute the defendant made a contract with

the City of New York to furnish a supply of water adequate for the Borough of Richmond, and of not less than 3,000,000 gallons a day. Thereupon this information was brought praying that pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic River out of the state."

Mr. Justice Holmes, speaking for the court, said:

> "It is sometimes difficult to fix boundary stones between the private right of property and the police power when, in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state is a quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."

The Court will take judicial notice of many legislative enactments that have been passed for the protection, reforestation, and continued production of the forests in the state, all of which were entirely valid. The forests do not extend over all the land within the state by any means, but the law in question applies only to the area which has grown and is growing forests.

A brief was filed in this case by Hon. Chas. H. Paul as *amicus curiae* in support of plaintiff, and in that brief, a case reported in 103 Me. page 506, was cited and relied upon as rather controlling, applied to the facts in the instant case. It is manifest that the decision was based upon a purported state of facts submitted by the Senate of that state under the provisions of the constitution which required an opinion by the Supreme Judicial Court of the State of Maine. Under the constitution of that state any proposed legislation may be submitted to the Supreme Court for an opinion relative to its constitutionality. The

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record is silent whether the question as submitted was ever enacted into law. The assumption is to the effect that it was not. By resolution of the Senate of the State of Maine under date of March 27, 1907, the Supreme Court was requested to give to the Senate its opinion on questions set forth in the decision. It is quite evident that a law was not enacted in which was incorporated the question submitted for opinion, as that legislative session adjourned on March 28, 1907, and the request for an opinion was not received by the Supreme Court until April 6th of that year, nine days after the adjournment of the legislative body. I concur with counsel for the defendant that the case just cited has but little, if any, application whatever.

The Attorney General and Judge Paul both cited the case of the *State of Washington* v. *Van Vlack*, 101 Wash. 503. In that case an information was filed in the Superior Court against the defendant, appellant therein, charging the appellant with unlawfully having in his possession one sack of clams taken for the purposes of sale during the closed season on clams. The appellant was prosecuted under the provisions of Chap. 31, Laws of 1915, p. 108, which reads:

> "It shall be unlawful for any person to take or dig clams or mussels from any of the tide lands abutting on Puget Sound, or from the waters of Puget Sound below the line of low tide, or have them in their possession if the same have been taken for the purpose of canning or selling between the first day of April and the first day of September of each year: provided, that nothing in this section shall prevent the taking of these clams for consumption of the taker or his family or guests at all times without a license." Rem. Code, Sec. 5150-100.

The appellant demurred to the information. The demurrer being overruled, he refused to plead further. Judgment

thereon was entered against appellant. Judge Webster speaking for the court, said:

> "The second proposition involves a more serious question—whether the restrictions placed by the Act upon the property of the individual constitutes inhibition or whether it is merely a regulation of the property right within the valid exercise of the police power of the state. At the outset it may be conceded that because of the peculiar characteristic of the claim—its fixed habitation when imbedded in the soil—clam beds may become the subject of private ownership which passes to the grantee by conveyance from the state of tide lands in which the beds are located. (Citing cases.)"

The opinion further states:

> "In this respect, clams differ from fish and game birds and game animals in their wild or natural state. The land owner acquires no vested ownership in the latter but the state may regulate and control the subject by virtue of its sovereign power. Since the state by reason of the private ownership of the individual has been divested of its ownership of clam beds in tide lands conveyed by the state, its power to regulate the industry or to restrict the rights of the land owner in the use and enjoyment of his property must necessarily depend upon whether it may do so by virtue of the police power with which the state is vested; that is to say, whether the statute as applied to private ownership is a lawful exercise of the police power. It will be observed that the gist of the offense defined by the statute is the taking or digging of clams for the purpose of canning or selling, or having clams so taken or dug in one's possession between the first day of April and the first day of September of each year. This is the only restriction placed upon the property right of the land owner. *It neither takes nor destroys his property; it merely regulates the use of it in the interest of the general welfare by conserving a valuable food product, as we shall presently see.* Provision is

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> expressly made that he may take for his own use or for the use of his guests at all times. The sole question, then, is whether the legislative enactment which prevents the owner from digging and taking his clams for the purpose of sale or canning them during the prescribed period deprives him of his property without due process of law."

There can be no doubt that the law invoking the closed season on clams was right and justified. The lowly clam, although delicious, is somewhat, even though to a small extent, migratory during certain months of the year as set forth in the statute. It propagates. "The larvae are active and swim freely upon the surface of the water where they are borne and scattered in all directions by the winds and tides until in a few days the shells become heavier, they sink to the bottom, and, resting on sea weeds, stones or other objects, become attached by byssus threads." • • • *"The effect of the statute is merely to prevent a private owner from so using his property as to interfere with or trench upon the corresponding ownership and rights of others, including the public."*

This case is not in point with the facts in the instant case for the reason that forests cannot be compared by the wildest stretch of the imagination to clam beds. The clam is a valuable food product and to restrict the taking of this product of nature during the season of propagation so as not to interfere with the rights of corresponding owners is proper, but for the state to maintain the right to exercise practically absolute dominion over forests and forest lands regardless of the title vested in individual owners goes far beyond the statute for the regulation and the propagation of clams.

(As an illustration,) It is common knowledge that in the great wheat and pea producing areas of this state the problem of erosion whereby thousands of tons of fertile

top soil is carried away every year by torrential rains and the melting of snow involves tremendous loss not only to the owners of the land but to the people of the state generally. In recent weeks we have seen erosion in the area mentioned at its worst. It has been estimated by the State Soil Conservation Service that during the height of the recent flood in the fertile Palouse area, ninety-three truckloads of soil equalling approximately 250 tons were swept away down the Palouse River every minute of a twenty-four hour period during the height of extreme high water. The damage to the fertility of the farms in that area for the present year by soil erosion is almost incalculable. Where the best farming practice is in effect in this particular area, soil erosion is greatly reduced by contour plowing and the planting of grasses that will prevent erosion. The police power of the quasi-sovereign is elastic, but if it can be stretched to the extent that dominion is exercised over the forest area of the state, then with the same reasoning, legislative acts extending the police power to farms and lands generally subject to excessive erosion could likewise be invoked. Not only the owners of such lands suffer great loss, but likewise crop production of all types is materially diminished, and as a consequence, all the people of the state must in time suffer by reason of the loss and the economy of the state definitely affected. "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more *until at last private property disappears.*" (*Supra.*)

The invasion of the respective states, as well as the Federal Government, in the right of every individual to conduct his business in compliance with law has gone far beyond our conception of a few years ago of what could possibly happen. It should not be permitted to go further irrespective of the extent that a legislative body may believe

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it should go, voluntarily or under undue pressure. It is apparent that if the constitutionality of the law in question is upheld, that it is only one step further to the control, domination, and, in fact, operation of the farms and other lawful business of this state directed by bureaus, agencies, and incompetents. It could also be extended to the great fruit producing areas of the state whereby fruit growers would be required to plant apples, peaches, prunes, pears, apricots, or other fruit trees and vines as designated and demanded by a state agency regardless of the wishes and experience and judgment of the owner of the land. This should never be permitted, but if there is a continuation of the policy as indicated in the present law, there can be no end to final and complete control and domination of the forests and farms of every type, as well as other business activities of the people of the state under guise of the police power. The men and women who have developed these areas are entitled to all credit for their efforts and successes. Many of them pioneered, and they were neither circumvented nor surrounded by such legislative enactments and restrictions.

In the so-called oil and gas cases, and there are many of them from the states in which oil and gas are found in large quantities, the police power has been extended to control the production in order that these natural resources may be conserved and adjoining land owners protected.

> "Article 16, Section 59a, of the Constitution (of the State of Texas) adopted in 1917, declared the conservation and development of the state's natural resources to be public rights and duties and provided that 'the Legislature shall pass all such laws as may be appropriate thereto.' Pursuant to this constitutional provision comprehensive statutes looking to the conservation of the oil and gas industry have been passed and their administration committed to the Railroad Commission. A compelling reason for the con-

servation of oil and gas resources is added in Texas, in that the state has reserved to itself a vast amount of minerals under its public lands and has set apart to its educational and eleemosynary institutions large quantities of land under which immense petroleum deposits are known to exist. Likewise, the extensive use of oil and gas for domestic and industrial purposes makes the conservation of those minerals a matter of vital importance to the public welfare. In addition, taxes derived from their production now constitute a large portion of the state's revenue. These facts and the clear mandate of the constitution of the Legislature in respect to conservation but emphasize the importance of conserving oil and gas resources for the general welfare of the public and of the state itself. Nor is this interest, nor the power of the state to conserve such resources, minimized by the fact that in Texas, as already observed, these minerals are considered as owned in place by the owner of the surface, rather than that a community of ownership in a common pool or deposit exists. Such ownership of oil and gas is subject to reasonable regulations by the state under its police power." 31A, Texas Jurisprudence, pp. 602-603.

It will be observed that the constitutional amendment was a clear mandate to the legislature of that state in respect to conservation. Prior to the adoption of the constitutional amendment there was never any attempt insofar as I am able to ascertain to extend the police power as proposed in the instant case.

In the case of *Gas Production Co.* v. *Rankin*, 63 Mont. p. 372, the Attorney General and Judge Paul contend that the result states a minority view, expressly repudiated in this state beginning with the case of *State* v. *Van Vlack, supra,* and *Wiegardt* v. *Brennan,* 192 Wash. 529, and other cited cases wherein our court took the position of the majority of the courts in sustaining the right of the legislature to envoke the police power. With this contention and theory

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I cannot agree, as herein set forth. The oil and gas cases are not in point in my opinion, as such minerals are rather migratory. A large and rich pool of oil may and often does underlie an area of land owned by various individuals and corporations and states. The courts have held without exception that while ownership of oil underlying the surface belongs to the surface owner of the fee, still such owner must reduce the oil and gas to actual possession before it becomes his property. The Court will take judicial notice that oil and gas wells drilled in a favorable location may drain the entire area of that particular pool and deprive adjacent owners of valuable property by draining therefrom the oil and gas within that pool. On the converse, timber growing on land is permanent and a part of the land until harvested or burned or destroyed by the forces of nature or from other causes. When a land owner cuts the timber growing thereon, it becomes personal property. It cannot be said with any justification whatsoever that by reason of cutting that the timber belonging to the adjoining land owner is damaged in the slightest. Certainly production will not be curtailed, and surely the growth will not be affected on adjoining lands. Forests, where not reserved in contracts, deeds and conveyances from the sovereign state, belong to and are a part of the land, and the ownership is vested in the purchaser and his successors in interest. Title has passed, no reservations made. The contract is definite between the sovereign state and the purchaser, subject to law relating to fire hazards and other rules and regulations that have been imposed for the general welfare. The facts were stipulated.

Many cases have been cited by respective counsel, which I have read, but in order that this opinion may not be extended to undue length, I have come to the conclusion that the act is unconstitutional. In view of the plain mandates of the Constitutions of the United States and of the State

of Washington whereby the impairment of obligation of contracts is violated under the provisions of this act, it cannot be upheld. The demurrer of defendant is sustained.

Very respectfully,

(S.) W. Lon Johnson,
*Judge.*

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## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 30642

The State of Washington, *Appellant,*

*v.*

Avery Dexter, *Respondent.*

Department One—Filed February 18, 1949

Respondent Avery Dexter and Hazel Dexter, his wife, had since September, 1945, held title in fee simple to three hundred twenty acres of marketable second-growth timber in Pend Oreille county. Beginning in November, 1945, and continuing into 1946, Dexter cut approximately one hundred fifty thousand board feet, log measure, of fir, larch, and white pine on that property; from November, 1945, until a restraining order issued in this action in October, 1947, he cut hemlock suitable for pulpwood.

In 1947 the state forester became aware that the respondent was cutting and removing timber, and directed him to shut down his operations until a permit was obtained. The respondent refused to apply for a permit, and proceedings were instituted by the state enjoining further timber-cutting operations until such time as the respondent should apply for and receive a permit from the state forester, which permit he could not obtain without giving satisfactory assurance that he would comply with chapter 193, Laws of 1945, as amended by chapter 218, Laws of 1947, being

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Rem. Supp. 1945, §§ 5823-10, 5823-16, 5823-18, and Rem. Supp. 1947, §§ 5823-11 to 5823-15, inclusive and § 5823-17.

A demurrer was interposed, and, as it was apparent that the case was to be carried to this court, the trial court properly and wisely requested that the facts be stipulated and an answer be made to the complaint; and that was done. The trial court, being convinced that the statutes above referred to, under which the state forester had proceeded and the state had brought its action, are unconstitutional, then sustained the demurrer to the complaint, which had been amended to conform to the facts as stipulated, and dismissed the action. The state has appealed.

The act which was held to be unconstitutional by the trial court contains an expression of its purposes and policy in its first section, which reads as follows:

"Keeping the forest land of this state continuously and fully productive is one of the most important steps toward perpetuation and conservation of its forest resources. One of the most important means of effectuating such public policy is to keep timber lands productive by seeking to maintain continuous growth of timber on all lands suitable for such purposes, and in order to accomplish this end it is necessary, and in the public interest, to prescribe certain rules of forest practices to be observed in the harvesting of timber." Laws of 1945, chapter 193, § 1, p. 556.

It provides that every owner or operator shall leave reserve trees of commercial species in a quantity deemed adequate under normal conditions to maintain continuous forest growth, or provide adequate restocking to insure future forest protection. Different minimum standards of compliances are provided for operations east and west of the summit of the Cascade mountains. Every owner or operator conducting logging operations (with exceptions not here material) is required to secure a permit from the state forester, to secure which he has to agree to abide by the provisions of the act.

There is just one question before us, *i. e.*, Is the statute constitutional? Or, stated more specifically, Does the state have the right, under its police power, to require those who

engage in commercial logging operations to make provision for reforesting the area logged by leaving a certain number of trees for reseeding purposes or by restocking?

The police power of a state is declared

". . . to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety." *State* v. *Pitney*, 79 Wash. 608, 611, 140 Pac. 918, Ann. Cas. 1916A, 209. And in *Campbell* v. *State*, 12. Wn. (2d) 459, 122 P. (2d) 458, we approved the following statement from *Shea* v. *Olson*, 185 Wash. 143, 153, 53 P. (2d) 615, 111 A. L. R. 998;

"However difficult it may be to give a precise or satisfactory definition of 'police power', there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people. Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution. [Citing cases.]"

The trial court in its "Memorandum Opinion" very ably champions the rights of private property and of private enterprise, and pictures graphically the effect of bureaucratic controls on farms and other lawful business in the state. We are in accord with much that is said therein, but it must be realized that private enterprise must utilize its private property in ways that are not inconsistent with the public welfare. The supreme court of the United States, speaking through its then chief justice, Charles Evans Hughes, in the case of *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 442, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, said:

"It is manifest from this review of our decisions that there has been a growing appreciation of public needs and

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of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

Unfortunately for the respondent's plea for the unrestricted right of the owner of timberland to do as he pleases with his own, the record of such unrestricted use has been one of "cut out and get out," the logged-off lands (having no economic value) being left to revert to the county for unpaid taxes. Denuded hillsides have made possible the rapid runoff of surface waters, thus increasing the dangers from floods and contributing to costly soil erosion.

Fifteen years ago we commented upon the problem of our vanishing forests and the problems of reforestation of the vast areas of our state from which the timber had already been removed and the necessity of planting "denuded areas, to remedy, in part at least, the wasteful practices of the past." *State ex rel. Mason County Logging Co.* v. *Wiley*, 177 Wash. 65, 71, 31 P. (2d) 539. And now respondent, while personally disclaiming any wasteful practices, says in effect that individuals must be left free to continue such practices because they have a vested right so to do.

We do not think that the state is required by the constitution of the United States to stand idly by while its natural resources are depleted, and higher authority supports our view. *Walls* v. *Midland Carbon Co.* 254 U. S. 300, 65 L. Ed. 276, 41 S. Ct. 118.

Today many companies, faced with the rapid diminution of stands of timber once deemed inexhaustible, have developed effective reforestation programs; the Federal and state governments have for many years carried out such programs at public expense. The issue, then, is, Can the state compel participation in a reforestation program on land for which no other beneficial use is contemplated? (The act does not apply where the removal of trees is sought, *inter alia*, for the following purposes:

". . . (b) To clear the land upon which said trees are situated for bona fide agricultural, mining, business or residential purposes.

"(c) To clear rights of way, landings, campsites or firebreaks." Laws of 1945, chapter 193, § 9, p. 560)

Edmund Burke once said that a great unwritten compact exists between the dead, the living, and the unborn. We leave to the unborn a colossal financial debt, perhaps inescapable, but incurred, none the less, in our time and for our immediate benefit. Such an unwritten compact requires that we leave to the unborn something more than debts and depleted natural resources. Surely, where natural resources can be utilized and at the same time perpetuated for future generations, what has been called "constitutional morality" requires that we do so. In that way, we can, in the words of Chief Justice Hughes, use "reasonable means to safeguard the economic structure upon which the good of all depends." *Home Bldg. & Loan Ass'n* v. *Blaisdell, supra.*

There is ample and sound authority to sustain our conclusion that the challenged legislation is for the general or public welfare and is a proper exercise of the police power:

". . . the amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated." Opinion of the Justices, 103 Me. 506, 511, 69 Atl. 627, 19 L. R. A. 422.

"That the protection and conservation of the natural resources of the state are in the general welfare and serve a

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public purpose, and so constitute a reasonable exercise of the police power, is now so well settled that no further citation of authority is necessary." *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal.(2d) 489, 529, 45 P. 2d 972.

"One of the inherent powers of the State is to conserve her natural resources and to regulate the severance thereof." *State* v. *Standard Oil Co. of La.* 188 La. 978, 1007, 178 So. 601.

"The state, in the exercise of its power to enact laws for the general welfare of its people, may enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth. The majority of the authorities, moreover, support the rule that not only adjoining landowners, but the public at large, have an interest in the preservation of the natural resources of the country sufficient to justify appropriate legislation to prevent exploitation or waste of such resources by the owners of the land on which they are found. This rule finds specific expression in laws forbidding any waste of natural gas, oil, or mineral waters and subterranean flows and in laws forbidding the cutting of standing trees or the removal of stone, gravel, and sand from the seashore." 11 Am. Jur. 1034, Constitutional Law, § 276.

See, also, *State* v. *Van Vlack*, 101 Wash. 503, 172 Pac. 563, and *Wiegardt* v. *Brennan*, 192 Wash. 529, 73 P. (2d) 1330.

Respondent develops four arguments in support of the judgment, two of which may be considered together, *i. e.*: (1) The act authorizes what amounts to the taking of private property without compensation and establishes an unreasonable exercise of the police power; and (2) it destroys private property rights and impairs the obligation of contracts as guaranteed by the constitution of the United States.

Respondent urges, and the trial court principally relied upon, the proposition that the act in question impairs the obligation of contracts, in contravention of Art. 1, § 10, of the constitution of the United States. It is also strenuously urged that it provides for the taking of property without

due process of law, in contravention of amendment 14 of the constitution of the United States, and Art. 1, § 3, of the Constitution of the State of Washington. These arguments are bottomed upon the proposition that there are no restrictive reservations in the patent from the United States preventing the cutting of timber on respondent's property or requiring reforestation, and that, having a fee-simple title, respondent is entitled to do as he pleases with his own property.

The answer to this argument is admirably expressed in the oft-quoted words of Chief Justice Shaw of the supreme judicial court of Massachusetts (quoted in part, with approval, via Story on the Constitution, Vol. 2 (5th Ed.), 701, § 1954, in *State* v. *Van Vlack, supra*):

"We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well as that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish

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all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." *Commonwealth* v. *Alger,* 61 Mass. (7 Cush.) 53, 84.

The contention with reference to the due process clause of the Federal and state constitutions is summarily disposed of by the Supreme Court of the United States in *Barbier* v. *Connolly,* 113 U. S. 27, 31, 28 L. Ed. 923, 5 S. Ct. 357, where, speaking of the fourteenth amendment, the court said:

". . . But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity";

and by this court in *Shea* v. *Olson,* 185 Wash. 143, 153, 53 P. (2d) 615, where we said:

"We next consider the provisions of Art. 1, §§ 3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.

"None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power. We have repeatedly so held. [Citing cases.]"

Cases will be found in the annotations in 24 A. L. R. 307 and 78 A. L. R. 834, upholding legislation designed to control the exploitation or waste of natural resources by the owners of land on which they are found, against various constitutional objections, such as: (a) It constitutes a taking of property without due process of law; (b) it denies the equal protection of laws; (c) it grants special privileges or immunities or is class legislation; (d) it constitutes tak-

ing property without just compensation; (e) it impairs existing contract obligations; (f) it is local or special in its application. Most of the cases cited are oil and gas cases, which the trial court in the instant case seeks to distinguish on the basis that oil and gas wells drilled on one person's property may drain an extensive area and deprive adjacent owners of valuable property rights. However, the reasoning in most of the cases discussed in the annotations referred to does not predicate the right of regulation on the preservation of the rights of adjacent property owners, but on the interest of the public in the conservation of those resources.

Respondent also urges that the act in question is unreasonable, unnecessary, arbitrary, and oppressive, and is not required for the reasonable promotion of the general welfare.

It is possible that, while the ends sought to be achieved by certain legislative enactments are constitutional, the methods and procedures provided may be unreasonable, arbitrary, or oppressive, and not really designed to accomplish the expressed purpose of the act. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 49 S. Ct. 50, 86 A. L. R. 654.

Respondent's argument on this point is directed at § 5 of the 1945 act as amended (Rem. Supp. 1947, § 5823-14). The requirements of the statute are that reserve trees of commercial species adequate to maintain continuous forest growth must be left in the area logged, or that adequate restocking be provided. (Laws of 1947, chapter 218, § 3, amending § 4 of the 1945 act; Rem. Supp. 1947, § 5823-13.) East of the Cascades the act is complied with if all immature ponderosa pines of sixteen inches or less in diameter at breast height are left uncut, unless that would leave less than four ponderosa pines per acre of at least twelve inches in diameter at breast height. In that event, it is required that there be left additional trees of commercial species predominant in the stand, including ponderosa pine, of sixteen inches or larger in diameter at breast height, in a quantity sufficient to aggregate four trees to the acre, well distributed over the area cut. (Laws of 1947, chapter 218,

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§ 4, amending § 5 of the 1945 act; Rem. Supp. 1947, § 5823-14.)

Respondent takes the position that the effect of this provision is

". . . to change the operation of this timber property from Avery Dexter to the State of Washington. Before Avery Dexter can now remove one stick of timber from his property, he must not only secure a written permit in advance, which may be denied, but he must also sign an agreement that he will go into the business of growing timber on his private property. Should he endeavor to restock his land with timber, and should he fail, for any reason whatever, the State can then step in and forfeit a sum of money worth practically the value of his land, and move upon his property, and engage in the business of growing timber in his stead."

As a matter of fact, all Avery Dexter or any other owner of land supporting a merchantable stand of timber located east of the Cascades is required to do, is to agree to leave uncut all ponderosa pines sixteen inches or less in diameter at shoulder height and, if there are not four ponderosa pines of twelve inches in diameter at shoulder height to the acre, to leave four trees to the acre meeting certain qualifications for reseeding the area cut. He does not have to agree to keep the land; he does not have to agree to grow timber; he does not have to guarantee reseeding. He just has to leave sufficient trees for that purpose. When the owner is not the operator, the forester may require an agreement that the owner will be jointly responsible with the operator for carrying out the provisions of the act, or that the operator furnish a bond or other security to insure satisfactory compliance with the act. That is a reasonable and proper provision; however, it does not affect Dexter, as he is an owner-operator. The restocking and money-forfeiture provisions referred to in the quotation from respondent's brief become effective only if he elects *not to leave seed trees*, but instead, to cut clear and restock.

Respondent also attacks the provision of § 5 as amended (Rem. Supp. 1947, § 5823-14) that, on areas of second-

growth and prior cut timber, where poles, piling, mine timbers or other special products are being harvested, not over half of the trees between twelve and eighteen inches in diameter at breast height shall be cut within any ten-year period. The words of the supreme judicial court of Maine are apropos:

". . . While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched, and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or 'taken'." Opinion of the Justices, 103 Me. 506, 512, 69 Atl. 627, 19 L. R. A. 422.

There is nothing within the terms of the act itself from which we can say that the requirements of § 5 as amended are unreasonable, arbitrary, or oppressive, or that they are not intended to accomplish the expressed purpose of the act. As we said in *Wiegardt* v. *Brennan, supra,* answering the argument of Wiegardt that the restriction against digging clams for commercial purposes on his own property during certain seasons of the year was unreasonable and arbitrary:

". . . It frequently happens that regulatory laws, enacted under the police power in furtherance of some appropriate purpose, impose hardship in individual cases, due to special and peculiar circumstances; but this fact will not subject the law to constitutional objection."

Respondent argues, finally, that the act grants special privileges, in violation of Art. 1, § 12 of our state constitution, and tends to create a monopoly of the timber resources of the state. Respondent reasons:

". . . the final result will be that because of the unreasonable and oppressive terms and conditions of this act,

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the ordinary private individual of limited means will be unable to retain his present holdings, or acquire further future holdings to remove timber. The natural result will be that the timber lands of this State will eventually fall into the hands of those who can afford to hold them over a long period of years. The result will be a monopoly of the timber business, and the public welfare will not thereby be advanced, but will be adversely affected."

The act is equally applicable to all owners and operators and does not require the holding of land over long periods of years. It merely requires, as a protection against the logger who intends to "cut out and get out," that he leave sufficient trees to reseed the cutover area, or submit some acceptable alternative to accomplish the purpose of maintaining continuous forest growth.

The trial court erred in sustaining the demurrer to the amended complaint and in dismissing the action. The cause is remanded, with instructions to overrule the demurrer.

HILL, J.

We concur:

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BEALS, J.
STEINERT, J.,
MALLERY, J.

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SIMPSON, J.—(Dissenting.)

Because the majority opinion approves a law which takes from the people of this state another of their constitutional rights, I dissent.

The development of the doctrine of "the police power" has passed all constitutional barriers, so that now all that is necessary to introduce and enforce any repressive measure is to use a high-sounding, plausible preamble, and the courts will then approve, regardless of the fact that personal liberties are taken from the individual. Let us not forget that

". . . the Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom

under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the people of the United States,' it says, 'do ordain and establish this Constitution . . .' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly—'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . ' The supremacy of the Constitution as Law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict." Carter *v.* Carter Coal Co., 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

As stated in the above case, "Every journey to a forbidden land begins with the first step." That danger is apparent in the statute before us. The only difficulty with us is that we have too many times taken the first step. It is not too late to reform.

True, it is of importance that we preserve our natural resources, but they should not be preserved at the expense of the liberties of the people of this state and nation, and that is the thing the present act proposes to do. I call attention to certain provisions of the law which either encroach upon, or take away, an individual's right to do with

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his property as he pleases. I shall point out later that an individual has a right to sell his own property in any way he sees fit, and to use his property as he desires.

*Any* bona fide *owner or operator of land* in the state with a merchantable stand of timber to be cut during the current year, *must first obtain a written permit from the forester.* The owner or operator must make a written application to the forester, and submit a map showing the area to be logged, legal description, and acreage. Should application be made by the operator, the forester may require that he secure from the owner, and file with the forester, an agreement that the owner will be jointly responsible with the operator for the carrying out of the requirements of the act, or that the operator shall furnish a bond or other security satisfactory to the forester to assure satisfactory compliance with the act. The permits expire at the end of each calendar year, but may be renewed upon the written application of the owner, providing there has been no violation of the act. The foregoing provisions are found in Laws of 1947, chapter 218, § 2.

Section 4 of the act provides that every permittee must provide that during the process of logging adequate precautions shall be taken to *leave reserve trees of commercial species deemed adequate* under normal conditions to maintain continuous forest growth, or *provide adequate restocking to insure future forest production.* The act then specifies when poles or stands of timber may be *cut and sold,* and what *portion of the timber must be left to grow.* Section 7, chapter 193 of the act of 1945 provides that the *owner or operator may adopt other practical methods than contained in the act, but if he does, they must* be *approved by the forester.* Section 6 of the 1947 law is so very definite that I quote it in full:

"SEC. 6. Section 8 of chapter 193, Laws of 1945 (Rem. 1945 Supp. 5823-17; PPC 1945, 574h-15) is hereby amended to read as follows:

"Section 8. The *Forester* shall have the power to employ a sufficient *number of technically trained foresters as inspectors* to enable him to maintain an *inspection service*

deemed adequate to *secure compliance with the provisions of this act.* In the event that an *owner or operator shall fail, refuse or neglect to comply with the provisions of this act,* the *Forester* shall be empowered to *order* the particular operation in which the violation occurs *discontinued* until the owner or operator has given satisfactory assurance that he will resume operations in compliance with the provisions of this act and *furnish cash deposit* or bond in lieu thereof as set by the Forester but not to exceed eight dollars ($8) per acre for that portion of the area which through his failure to carry out the provisions of this act does not have sufficient source of seed to adequately restock the area. *Such order may be enforced by injunction proceedings.* Such cash deposit or bond shall be furnished to insure that the owner or operator will artificially restock the area for which the money was collected, within five (5) years. *In the event that at the end of said five (5) years the owner or operator has not artificially restocked the area, or this area has not become adequately restocked, the cash deposit shall be forfeited,* or if the owner or operator has posted bond in lieu of making cash deposit he shall within thirty (30) days after notification in writing by the Forester furnish the amount of money for which he has posted bond. The Forester shall place this money in a special deposit fund of the State Treasury for artificially restocking the land on which the deposit was withheld. *The Forester shall artificially restock the area within two (2) years after said deposit has been forfeited,* using the money in the special deposit fund collected from the owner for that purpose. In the event that the full amount of money forfeited for any specified area is not required by the Forester to restock the area, the unexpended balance shall be returned to the depositor. *Until compliance is so assured, the Forester shall also have power to prevent any new operation or operations in this state by the delinquent operator.* Any person violating the provisions of this act by operating without a permit shall be guilty of a misdemeanor, and each day of operation shall constitute a separate offense." (Italics supplied.)

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Section 9 of the 1945 act contains a provision that the act in question shall not apply where, upon application to the State Forester, he has in writing permitted the removal of trees. The permits are required to be issued when removal is sought, (1) to benefit the general health and increase annual growth of residual timber stands, or for the purpose of removing dying or diseased trees; (2) to clear the land upon which said trees are situated for bona fide agricultural, mining, business or residential purposes; (3) to clear rights of way, landings, campsites, or firebreaks. In other words, *the management and control of property owned by an individual is transferred to the forester.* The American citizen who owns land upon which there are trees has no longer any right to do other than obey the dictates of the state forester.

Appellant says in its brief:

"It will not do to say that only the land owner is concerned with whether timber growth is perpetuated on his land. That is the concern of the man who must in the future buy timber, of the laborer who hopes to make a living from the lumber industry, of the merchant, the banker and the manufacturer, who depend upon a stable economy in our state. In short it is the concern of everyone."

In other words, it is the right of the state and not that of the citizen, which counts. If this be so, why limit ourselves to timber. As counsel for respondent points out, why not include our fields, our grains, our livestock, our soil, our places of private enterprise, the rearing of our children, the ordering of our daily lives? For, are not these things, too, the concern of everyone? What is more important than the raising of families? If the argument of the state is sound, why not have marriage bureaus with a director at the head so that every couple who desires to marry would be compelled to apply to the director for a permit, whereupon he would conduct an investigation to ascertain whether or not they were properly mated before approving their application.

Why not, also, if the state is to be the predominant factor, compel people who wish to have children to first get a per-

mit from the director of the bureau. In short, if we follow the argument to which I have just referred, and the holdings of this court in the present and some other cases, then we should have bureaus to see to it that we have a government of men and not of laws—in other words, a police state.

The trial judge, in his memorandum opinion, expressed the situation exceptionally well in the following language:

"The invasion of the respective states, as well as the Federal Government, in the right of every individual to conduct his business in compliance with law has gone far beyond our conception of a few years ago of what could possibly happen. It should not be permitted to go further irrespective of the extent that a legislative body may believe it should go, voluntarily or under undue pressure. It is apparent that if the constitutionality of the law in question is upheld, that it is only one step further to the control, domination, and, in fact, operation of the farms and other lawful business of this state directed by bureaus, agencies, and incompetents. It could also be extended to the great fruit producing areas of the state whereby fruit growers would be required to plant apples, peaches, prunes, pears, apricots, or other fruit trees and vines as designated and demanded by a state agency regardless of the wishes and experience and judgment of the owner of the land. This should never be permitted, but if there is a continuation of the policy as indicated in the present law, there can be no end to final and complete control and domination of the forests and farms of every type, as well as other business activities of the people of the state under guise of the police power."

In this case, I contend that the act under consideration seeks to take private property without consideration.

"The right of private property is a natural, inherent and inalienable right. Such right antedates all constitutions, but to insure its continuance, it is guaranteed by the federal and by the various state constitutions. As explained in § 599 et seq, infra, the right to property is also included within the constitutional guaranties of due process of law.

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"As protected by the various constitutions, property is more than a mere thing which a person owns. The constitutional guaranty embraces the right to acquire, possess, use, enjoy, protect, improve, lease, and dispose of property." 16 C. J. S. 606 Constitutional Law, § 209.

By reference, I reiterate as a dissent here the statements made in my dissent in State *v.* Sears, 4 Wn. (2d) 200, 223, 103 P. (2d) 337.

The constitution of the state of Washington contains the following provisions declaratory of property rights in this state:

"Personal Rights.—No person shall be deprived of life, liberty, or property without due process of law." Washington Constitution, Art. 1, § 3.

"Invasion of Private Affairs or Home Prohibited.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Washington Constitution, Art. 1, § 7.

"Eminent Domain.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." Washington Constitution, Art. 1, § 16, (now Amendment 9).

The legislature sought by the passage of the act under consideration to take from the people of this state a property right (the right to sell property) without just, or any, compensation whatever. The legislature, by this same act, has sought to compel property owners to expend money and labor to reforest their lands. All this is prohibited by our state and Federal constitutions.

As I have indicated, the ultimate end is confiscation of property rights and the imposition of governmental decrees by political appointees.

The act (Laws of 1947, ch. 218, § 6) also provides for the employment of inspectors. I presume that in violation of art. 1, § 7 of our State constitution which reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law," the inspectors will go upon the lands of those owning property and disturb their private affairs to see that the owners obey the mandates of the state forester.

The supreme court of Montana announced the proper rule in Gas Products Co. *v.* Rankin, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294. That decision concerned a statute which declared that the burning of natural gas without utilizing all the heat therein contained for other manufacturing or domestic purposes, was wasteful and unlawful and prohibited that act. In holding the act unconstitutional, the court said:

"Were we to sustain the constitutionality of the Act, there would be no limit to which the legislature might go in depriving persons of the use of private property under the guise of the police power. If it may constitutionally prohibit the use of natural gas taken from privately owned property for use in one industrial or manufacturing business, why not in another? If the rule contended for is given sanction, the use of natural gas in blast furnaces, smelters, factories or for cooking, heating or lighting is equally a proper subject for such prohibitory legislation. Under this rule there is no limit to which the legislature may not go. The owner of coal or minerals in the ground may thus by legislative control have his property rights so limited and restricted that he would be compelled to abandon mining although the owner of the fee in the land. The same rule would be applicable to percolating waters, oil, growing trees and agricultural crops grown upon the land. The land owner would be subject to regulation as to the number, kind and character of trees he might cut on his own land, and the conditions for cutting imposed. In short, all recognized principles of property rights would thus be

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destroyed. If the legislature may prohibit the burning of natural gas in the manufacture of carbon black because of the loss of heat units, why may it not as reasonably condemn its use for fuel on account of the fact that the carbon black contained therein is wasted? We are living in a free government, with definite guaranties of property rights, not under the rule of an emperor or czar. Such legislation is paternalistic in character and conflicts with the guaranties of the national and state Constitution and is contrary to the theory upon which our government was formed. The paternal theory of government is odious, and we should not treat lightly or disregard the sacred rights of property recognized and guaranteed by the government."

SIMPSON, *J.*

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## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 30642

STATE OF WASHINGTON, *Appellant,*

*vs.*

AVERY DEXTER, *Respondent*

ORDER CHANGING OPINION AND RECALLING AND CHANGING REMITTITUR

It is hereby ordered that the concluding paragraph in the opinion in the above cause be changed to read as follows:

On the facts as stipulated, the appellant was entitled to prevail and the trial court erred in dismissing the action. The cause is remanded, with instructions to enter an order enjoining the defendant from further timber-cutting operations within the purview of chapter 193 of the Laws of 1945, as amended by chapter 218 of the Laws of 1947, until he shall have obtained a permit from the state forester and given satisfactory assurances that he will, in his timber-cutting operations, comply with chapter 193 of the Laws of 1945, as amended.

It is further ordered that the remittitur in the above cause be recalled and altered to conform to the foregoing change in the opinion.

Signed at Olympia, Washington, this 13th day of May, 1949.

By the Court:

CLYDE G. JEFFERS,
*Chief Justice of the Supreme Court of the State of Washington.*

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 30642

Pend Oreille County No. 3743

STATE OF WASHINGTON, *Appellant,*

*vs.*

AVERY DEXTER, *Respondent*

JUDGMENT

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Pend Oreille County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 15 day of June, A. D. 1949, on motion of Smith Troy, Esquire, of counsel for appellant, considered, adjudged and decreed, that the cause be, and the same is, hereby remanded to the said Superior Court with instructions to enter an order enjoining the defendant from further timber-cutting operations within the purview of chapter 193 of the Laws of 1945, as amended by chapter 218 of the Laws of 1947, until he shall have obtained a permit from the state forester and given satisfactory assurances that he will, in his timber-cutting operations, comply with chapter 193 of the Laws of 1945, as amended; and that the said State of Washington

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have and recover of and from the said Avery Dexter the costs of this action taxed and allowed at Ninety-nine and 80/100 ($99.80) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 39 at page 110 in the office of the Clerk of the Supreme Court.

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